December 20, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Joseph M. Santos

Date of Filing: August 5, 2005

Case Number: TFA-0113

This decision concerns an Appeal that Joseph M. Santos (Appellant) filed on August 5, 2005. The Appellant submitted a request for information to the Department of Energy's (DOE) FOIA and Privacy Act Group (FPAG) seeking copies of all e-mails, records, and other documents in the possession of Ray Madden.[1] The FPAG referred Appellant's request to the Office of Inspector General (IG). On July 26, 2005, the IG issued a Determination Letter in response to Appellant's request. The IG's determination identified four case files as being responsive to the Appellant's request. With respect to three of the case files, the IG withheld significant portions of this information under FOIA Exemptions 5, 6, and 7(C). The IG stated that the other case file remained open at the time, and therefore the documents were being withheld in their entirety pursuant to FOIA Exemption 7(A). On August 5, 2005, the Appellant filed the present Appeal, contending that the IG's withholding of the information was improper.

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA, which set forth the types of information agencies are not required to release. Exemptions 5, 6, 7(A), and 7(C) and are at issue in the present case.

Exemption 7(A)

The Determination Letter withheld the entire case file of a pending IG investigation under Exemption 7(A). The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, i.e., as part of or in connection with an agency law enforcement proceeding. *FBI v. Abramson*, 456 U.S. 615, 622 (1982); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); *Williams v. IRS*, 479 F.2d 317, 318 (3d Cir. 1973), *cert. denied sub nom. Donolon v. IRS*, 414 U.S. 1024 (1973). In order to withhold information under Exemption 7, an organization must have statutory authority to enforce a violation of a law or regulation within its authority. *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority). By law, the IG is charged with investigating waste, fraud, and abuse in programs and

[1] The request was submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The IG is, therefore, a classic example of an organization with a law enforcement mandate. *See Dorothy Pritchett*, 20 DOE ¶ 80,224 (2005). In the present case the IG's investigatory actions were clearly within this statutory mandate.

Determining the applicability of Exemption 7(A) in particular requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending and (2) whether release of information about it could reasonably be expected to cause some foreseeable harm to the pending enforcement proceeding. *See Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993) (agency must make a specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); *Crooker v. ATF*, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (agency had failed to demonstrate that disclosure would interfere with enforcement proceedings); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) ("government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding").

In applying these standards in the past, the courts have found that agencies are not required to make a particularized, case-by-case showing of interference with their investigations. Rather, a generic determination of likely interference is sufficient. *See Murray, Jacobs & Abel*, 25 DOE ¶ 80,130 (1995) (*Murray*); *NRLB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978); *Crancer v. Department of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993). It is important to note that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs." *Bevis v. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (*Bevis*). Thus, when an agency elects to use the "generic" approach, it "has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings." *Bevis*, 801 F.2d at 1389-90; *Murray*, 25 DOE at 80,576.

Both the statute and the DOE's FOIA regulations require the agency to provide a reasonably specific justification for any withholdings. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). A reasonably specific justification of a withholding allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Turning to the present appeal, we find that the IG has provided a sufficient description of the withheld records. The determination letter indicates that the information withheld under Exemption 7(A) is the case file for a currently pending IG investigation. Determination Letter at 1. The IG states, "The material that is withheld under Exemption 7(A) includes documents pertaining to an ongoing investigation and includes case processing forms, memorandum of interviews and investigative activity." Determination Letter at 1.

The determination letter also provides a sufficient articulation of the harm that could reasonably be expected to occur if the withheld information was released. Specifically the determination letter notes that:

> Release of the withheld material at this time could prematurely reveal evidence and interfere with the ongoing enforcement proceeding. . . .

Determination Letter at 2. Since we agree with the reasoning set forth by the IG in its determination letter, we find that the IG has properly withheld the information under Exemption 7(A). We turn next to the information withheld from the other three case files.

Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally Ripskis*, 746 F.2d at 3.

The IG has found a privacy interest in the identities of the individuals whose names have been withheld. The Determination letter states in pertinent part:

> Names and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemptions 6 and 7(C). Individuals involved in the OIG enforcement matter, which in this case includes witnesses, sources of information, and other individuals, are entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions.

Determination Letter at 2. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals whose names are contained in investigative files. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual); *Cucarro v. Secretary of Labor*, 770 F.2d 355, 359 (3d Cir. 1985). Accordingly, we have followed the courts' lead. *James L. Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,129 (1990). Therefore, we find that release of the individuals' identities would result in significant invasions of privacy.

In *Reporters Committee*, the Supreme Court narrowed the scope of the public interest in the context of the FOIA. The Court found that only information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." *Id.* The Court therefore found that unless the public would learn something *directly* about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.*; *see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990). We fail to see how release of the identities of individuals in the present case would inform the public about the operations and activities of Government. Accordingly, we find that there is little or no public interest in disclosure of the individuals' identities.

After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of information revealing an individual's identity would constitute a clearly unwarranted invasion of personal privacy. Accordingly, we find that the identities of individuals were properly withheld under Exemptions 6 and 7(C). *See, e.g.*, *Tod Rockefeller*, 26 DOE ¶ 80,238 (1997).

Exemption 5

Finally, the IG has withheld information under Exemption 5. Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sea*rs). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). In withholding portions of document from the Appellant, the IG relied upon both the "deliberative process" privilege and the attorney-client privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150.

It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. V. United States*, 157 F.Supp. 939 (Cl. Ct. 1958)) (*Mink*). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of security or providing legal advice. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (*Mead*); *California Edison*, 28 DOE ¶ 80,173 (2001) (*California Edison*). The privilege covers facts divulged by a client to his or her attorney, and also covers opinions that the attorney gives the client based upon those facts. *Mead*, 566 F.2d at 254n.25. The privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts. *Id*. at 254 n.28. Not all communications between an attorney and client are privileged, however. *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992). The privilege is limited to those disclosures necessary to obtain or provide legal advice. *Fisher v. United States*, 96 S. Ct. 1569, 1577 (1976). The privilege does not extend to social, informational, or procedural communications between attorney and client. *California Edison*, 28 DOE at 80,665. "Where the client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication." *Mead*, 566 F.2d at 253 n. 24.

After reviewing the requested documents at issue, we have concluded that the determination made by the IG in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from the Appellant is contained in hotline complaint forms and memorandum of records which were prepared by DOE employees and intended only for internal DOE use. This information properly falls within the definition of "intra-agency memoranda" in the FOIA. In addition, the information withheld under Exemption 5 is clearly predecisional and deliberative. The information reflects the advisory opinions by subordinates in the IG and does not represent final agency positions. Accordingly, we find that these advisory opinions contained in the documents at issue meet all the requirements for withholding material under the Exemption 5 deliberative process privilege. Likewise, the information was also properly withheld under the attorney-client privilege of Exemption 5. The document at issue contains legal opinions and advice sought by IG Hotline employees from IG's Counsel. [2] For the reasons set forth above, we

[2] The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t[o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the withheld material in the documents at issue, which consist solely of advisory opinions and recommendations provided to DOE in the consultative process. The release of both the deliberative material and the

(continued...)

have found that the Office of Inspector General's withholdings under Exemptions 5, 6, 7(A) and 7(C) were appropriate.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Joseph M. Santos on August 5, 2005, Case Number TFA-0113, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 20, 2005

[2](...continued)
attorney-client communication could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987).